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MINNESOTA DISTRICT JUDGES ASSOCIATION
COMMITTEE ON JURY INSTRUCTION GUIDES—
CIVIL

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Preface

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This Pocket Part continues to contain a significant revision to CIVJIG 10.20, the jury instruction setting out the post-trial preliminary statement of the duties of a jury. The revision is based on work done by the Committee for Equality and Justice. The new section of the instruction contains important language instructing jurors on impartiality, fairness, and bias.

Finally, the Committee bids farewell to its longtime chair, Judge Kathryn Messerich. A member of the Committee since 2004, Judge Messerich has served as our chair for more than a decade. During that time, she oversaw the creation and publication of the Sixth Edition of the Civil Jury Instruction Guides, supervised the production of annual updates of the instructions and new editions of the Companion Handbook, and chaired countless meetings of the Committee, both in person and on Zoom. Through it all, she never lost sight of the central mission of our work: creation of comprehensive and accurate instructions to better guide and serve the judges, lawyers, and jurors of Minnesota. She has a keen sense of the law, an unerring eye for detail, and unflinching patience, and good humor. We are deeply thankful for her service, and we will miss her leadership greatly.

September 2022

EDWARD WAHL
Chair, MDJA Civil Jury
Instruction Guides Committee

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CATEGORY 60

INTENTIONAL TORTS

ASSAULT AND BATTERY

CIVJIG 60.20

CIVIL ASSAULT—DEFINITION

Substitute for CIVJIG 60.20 in Main Volume:

An assault occurred if:

1. (Defendant) acted with the intent to cause apprehension or fear of imminent (harm to)(offensive contact with)(plaintiff)(or another)[or intended to cause an imminent harmful or offensive contact with (plaintiff)(or another)], and

2. (Defendant) had the apparent ability to cause the (harm)(offensive contact), and

3. (Plaintiff) had a reasonable apprehension or fear that the imminent (harm)(offensive contact) would occur.

A contact is "imminent" if it will happen without significant delay.

USE NOTE

Add to use note:

The bracketed language in the instruction should be used in cases where transferred intent is in issue. Depending on the case, the instruction makes it clear that the defendant is liable of the intend an assault or battery either to the plaintiff or another and an assault occurs to the plaintiff.

CATEGORY 65

MOTOR VEHICLES

SPECIAL VERDICT FORMS

CIVSVF 65.92

UNINSURED MOTORIST INSURANCE

AUTHORITIES

Add the following to the end of the Authorities:

Castillo v. American Standard Ins. Co., 889 N.W.2d 591 (Minn. Ct. App. 2017), involved a no-fault claim on behalf of Jose Estrada-Martinez. Estrada-Martinez died from carbon monoxide poisoning while fixing a customer's tire in the cargo bay of his box truck. At the time of his accident, Estrada-Martinez was insured under a family no-fault automobile policy, but he did not have a separate business insurance policy covering his mobile auto-repair business. The plaintiff-personal representative brought a no-fault claim seeking personal injury protection benefits on behalf of Estrada-Martinez. The question arose whether the accident had occurred "off the business premises" under Minn. Stat. § 65B.43, subd. 3, so that coverage was available under the no-fault policy. The court of appeals held that "when [Estrada-Martinez] was working on customers' vehicles in his truck as part of his business, he did not fall within the category of persons whom the No-Fault Act was designed to protect . . .. Because Estrada-Martinez's injury occurred while he was performing repair work for customers in his truck, which was his business premises, the scope of no-fault coverage does not extend to compensation in this case." *Castillo*, 889 N.W.2d at 595.

CATEGORY 75

PRODUCTS LIABILITY

INTRODUCTORY NOTE

Add the following at the end of the Introductory Note:

Minn. Stat. § 604.101, subd. 3, the economic-loss doctrine, precludes a buyer from bringing "a product defect tort claim against a seller for compensatory damages unless a defect in the goods sold or leased caused harm to the buyer's tangible personal property other than the goods or to the buyer's real property." Subdivision 4 also bars a buyer from bringing "a common law misrepresentation claim against a seller relating to the goods sold or leased unless the misrepresentation was made intentionally or recklessly."

In *Ptacek v. Earthsoils, Inc.*, 844 N.W.2d 535 (Minn. Ct. App. 2014), the court of appeals held that the economic loss doctrine as embedded in the statute did not preclude the plaintiffs from recovering under a negligence claim against Earthsoils for economic loss they sustained because the fertilizer Earthsoils provided was deficient in nitrogen, which reduced the plaintiffs" crop yield. The court of appeals held that because the statute exhaustively states the economic loss doctrine, negligence claims are not barred. *Id.* at 540.

CIVJIG 75.20

DESIGN DEFECT

USE NOTE

Add to the end of "USE NOTE" as new paragraph:

In cases where foreseeability is an issue for the jury, the Committee is of the opinion that the instruction incorporates that element in CIVJIG 75.20 in instructing the jury to consider "[t]he danger presented by the product" and "[t]he likelihood that harm will result from use of the product."

AUTHORITIES

Add to the end of Authorities:

In *Montemayor v. Sebright Products, Inc.*, 898 N.W.2d 623 (Minn. 2017), the court considered the relationship between duty and foreseeability in a design defect case. The case arose out of injuries sustained by the plaintiff, an employee of VZ Hogs, when his legs were crushed while he attempting to clear a jam in an extruder, a machine used to extract liquid from food waste. A co-employee turned the machine on at the same time, unaware that the plaintiff was in the extruder. When the machine was activated, a heavy door, called a plenum, descended on the plaintiff's legs. Both legs had to be amputated as a consequence.

The plaintiff brought suit against Sebright, the manufacturer of the extruder, alleging that the design was defective and that the warnings on the machine were inadequate. Sebright moved for summary judgment. The district court granted the motion, holding that the injury to the plaintiff was not foreseeable. The court of appeals affirmed. *Montemayor v. Sebright Prods., Inc.*, No. A15–1188, 2016 WL 1175089 (Minn. Ct. App. Mar. 28, 2016). The supreme court reversed the court of appeals.

The court considered the relationship between duty and foreseeability in a design defect case, and held that the facts presented a "close case" that required jury resolution of the foreseeability issue.

The Minnesota Court of Appeals decision in *Diehl v. 3M Co.*, No. A19-0354, 2019 WL 4412976 (Minn. Ct. App. Sept. 16, 2019), reflects the supreme court's approach to the foreseeability issue. The plaintiff in the case was walking on a public sidewalk in Duluth when she was hit by a car driven by R.B., who was intoxicated from inhaling the content of a can of dust remover manufactured and sold by 3M. She alleged that

the intoxication caused R.B. to lose control of his car. She brought suit against 3M, alleging that it negligently manufactured and sold the product while knowing that it could be "misused and abused by inhaling it to induce acute intoxication that incapacitates the abuser." 3M moved to dismiss for failure to state a claim upon which relief could be granted, arguing that it did not owe a duty to protect the plaintiff from the criminal misconduct of a third party, both because there was no special relationship between 3M and the plaintiff and because the "manufacture and sale of a dust remover did not create an objectively foreseeable risk to a foreseeable plaintiff." *Id.* at *2-*3. The plaintiff agreed that there was no special relationship but argued that the injury was foreseeable.

The district court granted the motion without reaching the foreseeability issue, holding that no duty existed because 3M's manufacture and sale of a product that others might misuse was not active misconduct and was instead, "nonfeasance" or "passive inaction," which is not enough to trigger a duty of care. *Id.* at *3.

The court of appeals reversed. The court noted the general rule that duty turns on whether there is a special relationship between the defendant and plaintiff and the harm to the plaintiff is foreseeable, or where the defendant's own conduct creates a foreseeable risk of injury. *Id.* at *4 Even assuming that 3M's role in R.B.'s conduct was not active, the court of appeals noted that there is still a duty "if 3M's own conduct of manufacturing and selling the product created a foreseeable risk of injury to Diehl," *id.* at *3, and that "[a]ccepting the facts in the complaint as true, it was reasonably foreseeable that R.B. would misuse the dust remover and become acutely intoxicated." *Id.* at *4.

In dissent, Judge Schellhas thought that the facts did not present a "close case." *Id.* at *5 (Schellhas, J., dissenting) ("[t]he link between the danger (being struck by a vehicle on the sidewalk) and 3M's alleged conduct (manufacturing a household dust-removal product) is simply too attenuated and remote to support the existence of a duty").

In cases involving superseding cause issues, foreseeability is also a key issue. The issue arose in *Green Plains Otter Tail, LLC v. Pro-Environmental, Inc.*, 953 F.3d 541(8th Cir. 2020), a case arising out of a 2014 fire and explosion at an ethanol production facility owned and operated by Green Plains Otter Tail. Green Plains sued for damages based on design defect and warning theories of recovery. Pro-Environment moved for summary judgment, arguing in part that the failure of Green Plains employees to follow directions in keeping a device called an accumulator charged was a superseding cause severing liability for any alleged defect in a regenerative thermal oxidizer used to burn off pollutants from ethanol production. The district court held that the failure by Green Plains to maintain the equipment "was a superseding cause that broke any causal connection between an alleged design

defect and the fire and explosion." 349 F. Supp. 3d 768, 776 (D. Minn. 2018). The Eighth Circuit reversed, holding that "[r]easonable minds could disagree whether PEI could foresee that a company would view the 'suggested' maintenance as mandatory, or would ignore it due to the effort required." 953 F.2d at 548, relying on *Parks v. Allis-Chalmers Corp.*, 289 N.W.2d 456, 459 (Minn. 1979), as approved by the Minnesota Supreme Court in *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 629 (Minn. 2017).

CIVJIG 75.30

MANUFACTURING DEFECTS

AUTHORITIES

Add to end of Authorities in Main Volume:

In *Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616, 621–22 (Minn. 1984), the supreme court stated the consumer expectation standard in the Restatement (Second) of Torts § 402A (Am. Law Inst. 1965), was inappropriate for use in design defect cases, but that it was appropriate for use in cases involving manufacturing flaw cases where there is "an objective standard . . .—the flawless product—by which a jury can measure the alleged defect."

The Minnesota federal district courts, applying Minnesota law, have utilized the "flawless product" comparison as the standard for determining defectiveness in cases involving manufacturing defects. In *Kapps v. Biosense Webster, Inc.*, 813 F. Supp. 2d 1128, 1147 (D. Minn. 2011), the court stated that "the core of a manufacturing-defect case is some manufacturing flaw—some deviation from a flawless product—that renders a product unreasonably dangerous." In *Reid v. Wright Medical Technology, Inc.*, the district court followed *Kapps* and applied the same standard. The court held that "a plaintiff 'must allege the product deviates from its design or other flawless products because of a manufacturing defect' to adequately plead a manufacturing-defect claim." No. 19-cv-1471, 2019 WL 4861988 (D. Minn. Oct. 2, 2019) (citation omitted).

CIVJIG 75.40

MANUFACTURER'S DUTY TO PROVIDE POST-SALE WARNINGS

Replace the Use Note and Authorities in Main Volume, pp. 195-199, with the following:

USE NOTE

The post-sale warning instruction must be read in light of the thresholds the Minnesota Supreme Court established in *Great Northern Insurance Co. v. Honeywell International, Inc.*, 911 N.W.2d 510 (Minn. 2018). The court adopted section 10 of the Restatement (Third) of Torts: Products Liability (2010), as the standard to be used in determining whether there is a post-sale duty to warn. Section 10 reads as follows:

> (a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.
>
> (b) A reasonable person in the seller's position would provide a warning after the time of sale if:
>
> (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
>
> (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
>
> (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
>
> (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

As the court noted in *Great Northern*, all elements in part (b) must be met before a product seller or distributor will have a post-sale duty to warn. *Great Northern*, 911 N.W.2d at 520.

AUTHORITIES

In *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn.

1998), *cert. denied*, 492 U.S. 926, 109 S.Ct. 3265, 106 L.Ed.2d 610 (1989), a case involving the Minnesota Supreme Court established guidelines for determining when a product seller has a post-sale obligation to warn of dangers created by its product. The court held that Goodyear had a post-sale obligation to warn of the dangers created by its rim:

> On the facts of this case, we hold that a continuing post-sale duty to warn existed and was adequately submitted . . . . Hundreds of thousands of K-rims have been used in millions of tire changes over the years without incident; of the 134 or so K-rim explosions which did occur, many are explained by improper servicing or misuse. Goodyear steadfastly maintains its K-rim is a safe product if used properly. Nevertheless, it became evident by the late 1950s that K-rims could be temperamental; that the margin of error in servicing the K-rim assembly was dangerously small and it might explosively separate with seemingly little provocation; that when explosions did occur, serious injury or death usually resulted; and, therefore, that great care was required in the handling and servicing of K-rims. Further, Goodyear has continued over the years in the tire rim business, and, although all K-rim production was discontinued by 1969, Goodyear continued to advertise its K-rims as late as 1977, and has continued to sell tires and tubes for use with used K-rims. Finally, Goodyear undertook a duty to warn of K-rim dangers. Under these circumstances, it seem to us that Goodyear has a continuing duty to instruct and to warn, so that users of used K-rims would be apprised of safety hazards which, at an earlier time, were not fully appreciated. A continuing duty to warn arises only in special cases. We think this is such a case.

426 N.W.2d at 833. The court did not establish a general rule or test for determining whether there is a post-sale duty to warn, however.

In *Great Northern Insurance Co. v. Honeywell International, Inc.*, 911 N.W.2d 510 (Minn. 2018), the court established a specific test for determining whether a post-sale duty exists. The court noted that there are two basic approaches to the issue. One, a multi-factor analysis, is based on *Ramstad v. Lear Siegler Diversified Holdings Corp.*, 836 F. Supp. 1511 (D. Minn. 1993), in which the court used a five-factor analysis in determining whether there is a post-sale duty to warn. The factors are:

(1) the defendant's knowledge of a product, including knowledge that the product may become defective with little provocation;

(2) the hidden nature of the danger;

(3) the potential for serious injury or death when the danger manifested;

(4) whether the defendant remained in that same line of business, continued to sell the product, and had advertised the product recently; and

(5) whether the defendant had, on its own accord, warned of the product's danger.

Id. at 1517.

The second approach, which the supreme court adopted, is set out in the Restatement (Third) of Torts: Products Liability § 10, which reads as follows:

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.

(b) A reasonable person in the seller's position would provide a warning after the time of sale if:

(1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Restatement (Third) of Torts: Products Liability § 10 (Am. Law Inst. 1998).

The factors in part (b) are conjunctive. All have to be met to establish the duty, an approach that the supreme court said will promote consistency in outcomes, "clarify any confusion that has developed about how to weigh particular factors," as opposed to the *Ramstad* approach, which weighs the factors on a case-by-case basis. *Great Northern*, 911 N.W.2d at 520. The rule adopted by the court does not include *Hodder*'s "undertaking a warning" consideration, which the court thought will remove a potential disincentive for product sellers to warn. *Great Northern*, 911 N.W.2d at 520.

The supreme court's concern in *Great Northern* was to establish guidelines for determining whether intermediaries in the chain of distribution will be obligated to provide post-sale warnings. As the court noted, the "reasonableness standard" in the Restatement rule applies to each party in the chain of distribution. In application, one party's conduct may be reasonable and another party's conduct may be unreasonable. *Great Northern*, 911 N.W.2d at 520.

The court also noted that the reasonableness standard is consistent with its warnings cases, where "the duty to warn may depend upon a product user's knowledge and a party's connection to product consumers," *id.* at 521, (quoting *Minneapolis Soc. of Fine Arts v. Parker-Klein Assocs. Architects, Inc.*, 354 N.W.2d 816, 821 (Minn. 1984), overruled on other grounds by Hapka v. Paquin Farms, 458 N.W.2d 683, 686–87 (Minn. 1990)).

CIVJIG 75.50

CAUSATION

AUTHORITIES

Add to end of Authorities in Main Volume:

In failure to warn cases the plaintiff must prove the inadequacy of the defendant's warning and that the inadequate warning was a direct cause of the injuries the plaintiff sustained. *See J & W Enters., Inc. v. Economy Sales, Inc.*, 486 N.W.2d 179, 181 (Minn. App. 1992). Minnesota has not adopted a "heeding presumption" that an adequate warning would have been heeded by the plaintiff. *See Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 925 (8th Cir. 2004).

The Minnesota Court of Appeals has held that "a plaintiff's admitted failure to read the warnings defeats his failure-to-warn claim as a matter of law." *Montemayor v. Sebright Products, Inc., No. A15–1188*, 2017 WL 5560180, *2 (Minn. Ct. App. 2017), citing *J & W Enters.*, 486 N.W.2d at 181 (Minn. App. 1992).

In *Montemayor*, on remand from the Minnesota Supreme Court's decision, 898 N.W.2d 623 (Minn. 2017), the court of appeals held that the plaintiff's failure to read the warnings on and associated with the extruder that he was attempting to unclog barred his recovery for failure to warn. In cases where the plaintiff has not read the warnings, the plaintiff may be able to prove that a different warning would have avoided the injury, but there has to be proof as to how additional warnings would have avoided the injury. The court of appeals found the evidence lacking in *Montemayor*:

> Montemayor's expert opines that Sebright should have provided more ready access to the manual and placed a sticker on the control panel providing instructions for unjamming the extruder. But the expert does not explain how these additional steps would have prevented Montemayor's injuries. Of the two VZ Hogs employees who reviewed the manual, one had only paged through it, and testified that the extruder was fairly self-explanatory. The other testified that the manual was located in a waterproof box on the side of the extruder. There is no evidence to support an inference that more employees would have read the manual if it was stored in a different location. With respect to the proposed sticker on the control panel, the employee operating the machine when Montemayor was injured unequivocally stated that he knew how to clear a jam and knew that the extruder should not be operated if anyone was inside of it. What he did not know was that Montemayor was

> inside the extruder when he started it up. In sum, as in J & W, it is speculative whether placing the manual in a different location or attaching a sticker with unjamming instructions on the control panel would have prevented Montemayor's injuries. "Mere speculation, without some concrete evidence, is not enough to avoid summary judgment."

Montemayor v. Sebright Products, Inc., No. A15–1188, 2017 WL 5560180, *3 (Minn. Ct. App. 2017).

The Eighth Circuit followed the same line of reasoning in *Green Plains Otter Tail, LLC v. Pro-Environmental, Inc.*, 953 F.3d 541(8th Cir. 2020), a case arising out of a 2014 fire and explosion at an ethanol production facility owned and operated by Green Plains Otter Tail.

The Green Plains Chief Boiler Engineer at Green Plains testified that while he had glanced at the manuals, he did not read through them "cover to cover." He stated that he knew of the accumulator's role and that the precharge had to be checked, but he was unaware that the HPU manual discussed the accumulator precharge, even though the warning label specifically stated that the instructions for precharging and maintenance should be followed.

Green Plains sued PEI in 2016, alleging negligence and products liability theories based on the defective design of the RTO and inadequate warnings concerning the importance of the accumulator. The court held that "[a]dditional warnings would not have changed the behavior of Green Plains." *Id.* at 549.

SPECIAL VERDICT FORMS

CIVSVF 75.92

MANUFACTURING DEFECT THEORY (SINGLE PLAINTIFF AND SINGLE DEFENDANT)

Replace the Special Verdict Form printed in the main volume with the following:

1. Was the product in a defective condition unreasonably dangerous to (the user) (the user's property) because it was improperly manufactured by (defendant)?

_____
Yes or No

2. *If your answer to Question 1 was "Yes," then answer this question*: Was the defective condition caused by the improper manufacture a direct cause of (plaintiff's) (injury) (damages)?

_____
Yes or No

3. *If your answer to Question 2 was "Yes," then answer this question*: Was (defendant) negligent in manufacturing the product?

_____
Yes or No

4. *If your answer to Question 3 was "Yes," then answer this question*: Was (defendant)'s negligence a direct cause of the plaintiff's (injury) (damages)?

_____
Yes or No

5. Was (plaintiff) negligent with respect to (his) (her) own safety?

_____
Yes or No

6. *If your answer to Question 5 was "Yes," then answer this question*: Was (plaintiff)'s negligence a direct cause of (his) (her) own (injuries) (damage)?

_____
Yes or No

[If you answered "Yes" to Question 6, and you also answered "Yes" to Question 2 and/or 4, then answer Question 7.]

7. Taking all of the fault that directly caused the plaintiff's (injuries) (damage) as 100%, what percentage of fault do you attribute to:

(Defendant Manufacturer)
If you answered "Yes" to Questions 2 and/or 4 _____%

(Plaintiff)
If you answered "Yes" to Question 6. _____%

TOTAL 100%

CIVSVF 75.94

LIABILITY ASSERTED AGAINST MANUFACTURER AND OTHER SELLER BASED ON DESIGN DEFECT (SINGLE PLAINTIFF, MULTIPLE DEFENDANTS)

8. Taking all of the fault that directly caused the plaintiff's (injuries) (damage) as 100%, what percentage of fault do you attribute to:

(Defendant manufacturer)

If you answered "Yes" to Question 2 and/or 5 _____%

(Defendant intermediary)

If you answered "Yes" to Question 5 _____%

(Plaintiff)

If you answered "Yes" to Question 7 _____%

TOTAL 100%

CATEGORY 80

PROFESSIONAL MALPRACTICE

INTRODUCTORY NOTE

Legal Malpractice

Add at end of the first paragraph of this section on p. 237 of the main volume:

In *Firkus v. Harms*, 914 N.W.2d 414 (Minn. Ct. App. 2018), the court of appeals considered the language in Minn. Stat. § 145.682, subd. 2, providing that the necessary affidavit of expert identification for medical malpractice is due "180 days after commencement of discovery under the Rules of Civil Procedure, rule 26.04(a)." The court held that the 180-day period begins to run no later than 30 days after the initial due date of the answer, the same date as the deadline for the discovery conference. The court rejected the plaintiff's argument that the 180-day period does not commence until the parties have actually conferred, even if that date is later than the deadline for the discovery conference.

Other Professional Malpractice-Expert Review

Add the following to the end of the section in the main volume at p. 247:

In *650 North Main Association v. Frauenshuh, Inc.*, 885 N.W.2d 478 (Minn. Ct. App. 2016), the plaintiff-condominium association brought an action against the developer and the contractor alleging negligence and breach of statutory warranty. Though the architect for the building was not a party, the condominium association alleged that architectural design defects in the building constituted a breach of the developer's statutory warranty. One of the issues on appeal was whether the plaintiff should have been required to follow the expert review requirements in Minn. Stat. § 544.42. The jury found that the developer had not breached its chapter 327A or chapter 515B warranties, but did find that the building was defective and the defective design was a direct cause of the association's damages. The jury apportioned damages to the contractor and the architect. On post-trial motion, the district court found the developer was responsible for the architectural design defects and was liable to the association for the damages the jury attributed to the architect.

On appeal, the developer argued that the district court erred when it failed to follow the procedures set forth in Minn. Stat. § 544.42 for claims alleging malpractice against professionals, including architects. The district court had denied the developer's motion in limine to exclude evidence of the architect's negligence, reasoning that the developer had hired the architect and could have brought a claim against the architect. The court of appeals affirmed, holding "[n]either of the association's statutory warranty claims constitutes an action alleging negligence or malpractice of a professional, which would require that the provisions of § 544.42 be followed."

In the wake of the failure of intertwined business ventures, the plaintiff in *Mittelstaedt v. Henney*, 969 N.W.2d 634 (Minn. 2022), filed a lawsuit against defendants including his business partner and alleged attorney, Henney. Plaintiff Mittelstaedt failed to submit either an affidavit of expert review or an affidavit or expert disclosure in support of his breach of fiduciary duty claim against Henney, arguing that since his claim was styled as breach of fiduciary duty claim, rather than a legal malpractice claim, the requirements of Minn. Stat. § 544.22 did not apply. The district court granted summary judgment, though it did not address the issue of whether expert affidavits were required. The supreme court held that "the statute's expert-affidavit requirement for cases involving 'negligence or *malpractice*' unambiguously applies to breach-of-duty claims when the statute's other requirements are met." *Id.* at 639 (emphasis in original). However, in malpractice actions against lawyers, courts must decide "on an ordinary case-by-case basis whether expert affidavits are required." *Id.* at 640-41. The court stated that the more stringent medical malpractice standard, where affidavits are required in all but the "rare" or "exceptional" case, had limited applicability in a legal malpractice case. *Id.*

Legal Malpractice

Add the following at the end of the subsection at p. 248 of the main volume:

In *Frederick v. Wallerich*, 907 N.W.2d 167 (Minn. 2018), the supreme court considered a legal malpractice claim arising out of an invalid antenuptial agreement. Wallerich prepared an antenuptial agreement for Frederick in 2006, which, because it did not include statutorily required signatures, was invalid. A year later, Wallerich drafted a will for Frederick, incorporating the antenuptial agreement by reference. When Frederick's wife filed for divorce in 2013, the court in the dissolution action ruled the antenuptial agreement was unenforceable.

Frederick brought a suit for legal malpractice against Wallerich. Though the execution of the antenuptial fell outside the six-year limitations period, Frederick alleged that Wallerich's subsequent representa-

tions that the antenuptial was valid were separate instances of malpractice each triggering their own limitation period. Frederick alleged that he incurred additional damages, separate from Wallerich's failure to prepare a validly executed antenuptial, because he could not protect the appreciation on his premarital assets resulting from Wallerich's failure to later inform him the antenuptial was unenforceable. Frederick also alleged that there were steps he could have taken, including divorcing his wife, to protect these assets. Wallerich moved for summary judgment. The district court determined that all Frederick's claims with respect to the antenuptial were untimely and granted summary judgment. The court of appeals affirmed.

The supreme court held that Wallerich's later failure to advise Frederick about the problems with the antenuptial could form the basis for a separate cause of malpractice and reversed:

> Accordingly, because (1) Frederick's position significantly worsened; (2) Wallerich's subsequent acts did not involve the same type of conduct as the 2006 acts; (3) the acts occurred at different times and, importantly, during different transactions; (4) the subsequent act was not connected by a sufficient causal link to the first act; and (5) the subsequent act specifically and explicitly incorporated and relied on the continued validity of Wallerich's prior work, we conclude that Frederick has made a minimal showing that the 2007 will drafting was an independent act of negligence, separate from the 2006 execution of the antenuptial agreement.

Frederick, 907 N.W.2d at 176. In reaching this result, the supreme court expressly rejected a rule that a lawyer owes a duty to a client to conduct new research and analysis each time previous work is revisited. *Frederick*, 907 N.W.2d at 177.

Add the following to the end of the (Proximate and "But For" Causation) section in the main volume at p. 252:

In *Ryan Contracting Co. v. O'Neill & Murphy, LLP*, 883 N.W.2d 236 (Minn. 2016), the supreme court considered the standard to be applied to a legal malpractice claim arising from settlement of a lawsuit. Plaintiff Ryan acted as contractor on a development project and hired Meagher & Geer, PLLP (MG) to pursue claims against the developer. After MG filed mechanic's lien statements on Ryan's behalf and began foreclosure of the liens, Ryan terminated MG and hired another law firm. Eventually, Ryan settled the lawsuit against the developer, but reserved any claims it had against third-parties, including claims against MG arising out of foreclosure of the liens. Ryan then hired O'Neill & Murphy to pursue a legal malpractice claim against MG. That suit was dismissed on MG's motion that O'Neill had failed to timely file expert witness affidavits. After dismissal of the suit against MG, Ryan

brought a claim of legal malpractice against O'Neill. O'Neill argued that Ryan's settlement of the suit against its former law firm precluded it from bringing the legal malpractice claim against O'Neill. The supreme court noted that Ryan did not claim that O'Neill's advice about settling the first malpractice claim violated the standard of care. The court stated that Ryan's claim was that MG "breached the standard of care in the lien-filing process and that, in turn, O'Neill breached the standard of care in pursuing Ryan's claim against MG." The supreme court ruled that the court of appeals had "applied the appropriate summary judgment standard to the case-within-a-case in this dispute, namely Ryan's mechanic's lien claim against" the original defendant. *Ryan Contracting*, 883 N.W.2d at 250.

Add to end of section in main volume at p. 252:

In *Guzick v. Kimball*, 869 N.W.2d 42 (Minn. 2015), the supreme court considered the application of the certification of expert review statute, Minn. Stat. § 544.42. In the course of analyzing disclosure requirements under the statute, the court considered the issue of whether expert testimony is required for the elements of a legal malpractice claim, something the court noted it has discussed "on only a few occasions." *Id.* at 49. The court has taken the position that the duty and breach of duty issues must be established by expert testimony. *See Hill v. Okay Construction Co.*, 312 Minn. 324, 335–36, 252 N.W.2d 107, 116 (1977). In *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 116 (Minn. 1992), the court reiterated *Hill*'s holding that expert testimony is required on the duty and breach cases "unless the conduct can be evaluated by a jury in the absence of expert testimony."

The court noted that it has "never required expert testimony on the other elements of a prima facie case of legal malpractice," however. *Id.* The court's discussion of whether expert testimony is required was equivocal:

> [*Brown-Wilbert, Inc. v. Copeland Buhl & Co., 732 N.W.2d 209, 219 (Minn.2007)*], an accounting malpractice case, credited [*Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 266 (Minn.1992)], a legal malpractice case, as "stating that expert testimony is generally required to establish the standard of care applicable to legal malpractice, whether the attorney deviated from that standard, and *whether that deviation caused the plaintiff's injury.*" *Brown-Wilbert,* 732 N.W.2d at 218 (emphasis added). But in *Admiral Merchants* we only stated that "[e]xpert testimony generally is required to establish a standard of care applicable to an attorney whose conduct is alleged to have been negligent, and further to establish whether the conduct deviated from that standard." 494 N.W.2d at 266 (citing *Hill,* 312 Minn. at 337, 252 N.W.2d at 116). In fact, in that case the plaintiff, Admiral Merchants, presented

> expert testimony "that the alleged failure to request arbitration was negligent," not that the negligent act caused the injury. *Id.* Even in the absence of expert testimony on causation, we concluded a genuine issue of material fact existed and reversed the district court's grant of summary judgment in favor of the law firm. *Id.* at 267.

Guzick, 869 N.W.2d at 49.

While there are statements to the contrary, the court has not taken the position that expert testimony is a requirement to establish causation.

In *Guzick*, however, the parties agreed that an expert was required to establish the acts that constituted negligence and proximate cause, but they disagreed as to whether an expert was necessary on the but-for causation requirement. *Id.* at 49–50. Justice Lillehaug, concurring, noted that had Guzick disputed that issue, it would have been a close case:

> [I]t is not entirely clear whether proximate cause in this case is even a question of fact for the jury, or rather a question of law for the court. *Compare Wartnick*, 490 N.W.2d at 115 ("The determination of proximate cause is normally a question of fact for the jury . . . . However, if reasonable minds cannot disagree, proximate cause becomes a question of law."), and Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. q. (Am. Law Inst.2010) ("Scope of liability is a mixed question of fact and law, much like negligence. As with negligence, the court's role is to instruct the jury on the standard for scope of liability when reasonable minds can differ as to whether the type of harm suffered by the plaintiff is among the harms whose risks made the defendant's conduct tortious, and it is the function of the jury to determine whether the harm is within the defendant's scope of liability."), with William L. Prosser, The Minnesota Court on Proximate Cause, 21 Minn. L. Rev. 19, 27 (1937) (arguing, regarding unforeseeable consequences and proximate cause, that the "question is not one of causation, for the causal connection is clear and direct, without intervening forces of any kind. It is rather one of policy, as to whether defendant's responsibility for its admitted fault is to be extended to such results.").

Guzick, 869 N.W.2d at 52, n.1 (Lillehaug, J., concurring).

The court also noted that it has "never addressed the need for expert testimony on but-for causation in a legal malpractice claim." *Id.* at 50. Rather than relying on a general rule, the court stated that it determines "whether the facts needed to establish but-for causation are

within an area of common knowledge and lay comprehension such that they can be adequately evaluated by a jury in the absence of an expert." *Id.*

Other Professional Malpractice

Add to end of section at p. 256:

In *Guzick v. Kimball*, 869 N.W.2d 42 (Minn. 2015), the issue was whether a personal representative/trustee provided a satisfactory expert disclosure on each element of a prima facie case of legal malpractice pursuant to Minn. Stat. § 544.42, subd. 4(a) (2014).

Guzick, personal representative of Nyberg's estate and trustee of the George Nyberg Trust, brought suit against Kimball, an attorney, and the Kimball Law Office for alleged malpractice arising out of the drafting of a Minnesota Standard Short Form Power of Attorney agreement (POA). Kimball's legal assistant drafted a POA that gave Nyberg's nephew the power to transfer property to Nyberg's nephew, the attorney-in-fact. Following transfer of funds by Nyberg's nephew, Guzick brought a conversion action against the nephew and his wife. They filed for bankruptcy. Guzick then was awarded a judgment in the nephew's bankruptcy proceeding.

Guzick's malpractice suit against Kimball and the Kimball Law Office alleged that Kimball had a duty to supervise his legal assistant to "ensure that her conduct and work product were 'compatible with [Kimball's] professional obligations,' " and that Kimball also had a duty to meet with Nyberg to assess his competency, the need for a POA, the scope of the authority provided for in the POA, the risks associated with that authority, and to determine if the nephew was the appropriate person to be named Nyberg's attorney-in-fact.

Guzick served an affidavit of expert review with the complaint against the defendants. The "affidavit stated that his expert had reviewed the facts alleged in the complaint, that the expert's qualifications 'provide[d] a reasonable expectation that her opinions would be admissible at trial,' and that the expert's opinion was that 'Kimball deviated from the applicable standard of care, and by that action caused damages.' " 869 N.W.2d at 44. The affidavit identified 10 acts by Kimball that deviated from the standard of care and caused damages. Guzick did not provide an affidavit of expert disclosure, although in response to one of Kimball's interrogatories concerning expert witnesses, Guzick did state that he had retained an expert. He referred Kimball to the affidavit of expert review for a summary of the expert's opinion.

The statute provides that a defendant may move for mandatory dismissal "of each action with prejudice as to which expert testimony is

necessary to establish a prima facie case" if the plaintiff fails to serve an expert disclosure affidavit or in the alternative, answers to interrogatories that satisfy the statutory requirement within 180 days after commencement of discovery. There is a "safe harbor" provision in section 544.42, subd. 6 (c) that requires a court to provide the plaintiff with notice of the deficiencies in the affidavit and gives the plaintiff 60 days to cure the deficiencies.

Kimball moved for summary judgment, arguing that Guzick had failed to provide a satisfactory affidavit of expert disclosure within the necessary time period, as required by section 544.42, subd. 2(2), and also that Guzick did not qualify for the curative provision in subdivision 6. Kimball argued that it was necessary for the expert to establish all elements of a legal malpractice claim. Guzick argued in response that his original affidavit of expert review satisfied subdivision 4 and, in the alternative, that his affidavit was sufficient to qualify for the safe-harbor protection in subdivision 6 (c).

The supreme court held that while the expert affidavit as a whole might be read to imply that Kimball's actions were the proximate cause of the injuries claimed by Guzick, it did not satisfy the requirement in the court's decision in *Brown-Wilbert, Inc. v. Copeland Buhl & Co.*, 732 N.W.2d 209, 219 (Minn.2007), of "meaningful information that 'summarizes the expert's opinion.' " *Guzick*, 869 N.W.2d at 51 (quoting *Brown-Wilbert*, 732 N.W.2d at 219).

MEDICAL PROFESSIONALS AND HOSPITALS

CIVJIG 80.10

DUTY OF A DOCTOR, DENTIST, OR HEALTHCARE PROVIDER

USE NOTE

Add the following text to the Use Note above Caveat:

There may be cases where there is no physician-patient relationship between the plaintiff and defendant physician. In *Warren v. Dinter*, 926 N.W.2d 370 (Minn. 2019), a medical negligence case of first impression, the supreme court held that the alleged decision of a hospitalist to deny admission of a patient to a hospital could constitute professional negligence, even absent a physician-patient relationship between the hospitalist and the person for whom a nurse-practitioner in a different clinic was seeking admission. The essential elements for establishing a duty in those cases are as follows:

1. The physician provided medical advice to a third-party professional,

2. The third-party professional relied on that advice,

3. It was reasonably foreseeable to the physician that the third-party professional would rely on that advice, and

4. It was reasonably foreseeable that the plaintiff would be injured if the advice was negligently given.

The Committee takes no position on how a jury should be instructed in these cases.

CIVJIG 80.11

LOSS OF A CHANCE OF (SURVIVAL) (MORE FAVORABLE OUTCOME)

AUTHORITIES

Add to end of Authorities:

In *Nelson v. Fairview Health Services*, No. A20-1134, 2021 WL 3277209 (Minn. Ct. App. Aug. 2, 2021), *rev. denied* (Minn. Oct. 27, 2021), a medical negligence case arising out the premature birth of a child that resulted in significant medical issues, the plaintiffs asserted that those medical issues were due to the negligence of the defendants. One of the plaintiffs' theories was based on loss of a chance. The court reiterated the requirement in *Dickhoff v. Green*, 836 N.W.2d 321, 337 (Minn. 2013), that the plaintiff must establish "a physician's negligence substantially reduced [her] chance of recovery.' " 2021 WL 3277209, at *6. The first step in loss of a chance theory is measuring the chance that is lost. The damages are measured " 'as the percentage of probability by which the defendant's tortious conduct diminished the likelihood of achieving some more favorable outcome.' " *Id.* (quoting *Dickhoff*, 836 N.W.2d at 335).

The court held that the claim failed because the plaintiff's experts did not specify "any percent by which Nelson's doctors' allegedly negligent treatment decreased Daughter's chances of being born 'with no or just mild disability.' " *Id.* The court added that even had the expert opinion "specified the chances, it would have failed because the loss of a chance has to be more than " 'a token or de minimis amount.' " *Id.* (quoting *Dickhoff*, 836 N.W.2d at 334 n.13). The court held that the medical opinions on which one of the plaintiffs' experts "based his general, unspecified opinion suggest a percentage loss, 4.1% and 4.3%, which would constitute an insufficient, token amount." *Id.*

CIVJIG 80.19

DUTY OF DOCTOR TO REFER

AUTHORITIES

Add to end of Authorities:

Otte v. Allina Health System, No. A20-0905, 2021 WL 1082333 (Minn. Ct. App. Mar. 22, 2021), involved a wrongful death suit brought against a clinic and clinic physician based on the physician's alleged negligence in terminating opioid drug administration to the decedent. Following a jury verdict for the defendants, the plaintiffs appealed after their motions for JMOL or a new trial were denied. On appeal they argued that the physician was negligent in failing to treat the decedent's withdrawal symptoms and in failing to refill her prescriptions, to appropriately taper the medications, or to refer her to a withdrawal specialist. The court of appeals held that the facts sufficiently supported the jury's verdict. *Id.* at *3. The motion for a new trial was based in part on the district court's failure to give the full instruction in CIVJIG 80.19. The district gave the first paragraph of the instruction ("A physician has a duty to refer a patient to a specialist if the physician discovers or should discover that a patient's condition is beyond his or her ability or skill to treat with reasonable success") but not the second ("If the physician does not refer the patient to a specialist, he or she is held to the same standard of care that a specialist in (*name of field*) would use in similar circumstances").

The court of appeals held that the district court correctly refused to give the second part of CIVJIG 80.19 because the expert witnesses in the case all agreed that the same standard of care would apply to both the defendant physician and the "unspecified physician" to whom plaintiff claimed defendant should have referred decedent. In addition, the decedent was under the continuing care of her prescribing neurosurgeon following surgery and the defendant physician deferred to the neurosurgeon's management of the decedent's pain medications. *Id.* In fact, decedent was advised to consult the neurosurgeon but failed to do so. *Id.*

The court held that the facts did not support the second paragraph of the instruction.

CIVJIG 80.25

INFORMED CONSENT (NEGLIGENT NONDISCLOSURE)

Replace the final section of the instruction, "Standard for not giving information" with the following:

[Standard for not giving information

A failure to get informed consent is not negligence if giving the information could:

1. Complicate or hinder the treatment;

2. Cause enough emotional distress that a rational decision could not be made by the patient, or;

3. Cause psychological harm to the patient.]

CIVJIG 80.28

PATIENT'S DUTY TO FOLLOW INSTRUCTIONS

AUTHORITIES

Add to end of Authorities:

In *Otte v. Allina Health System*, No. A20-0905, 2021 WL 1082333 (Minn. Ct. App. Mar. 22, 2021), the court of appeals held that that the district court properly instructed the jury on CIVJIG 80.28. The case was a wrongful death suit brought against a clinic and clinic family physician based on the physician's alleged negligence in terminating opioid drug administration to the decedent. Following a jury verdict for the defendants, the plaintiff argued in a motion for a new trial that the district court erred in giving CIVJIG 80.28. The defense theory was in part that the decedent should have followed her family physician's advice and consulted the neurosurgeon who prescribed the pain medication following her surgery for any continuance of her prescriptions. The court of appeals held that the instruction was consistent with the defense theory.

CIVJIG 80.43

LIABILITY OF HOSPITAL FOR NEGLIGENCE OF PHYSICIAN OR NURSE

AUTHORITIES

Substitute this discussion for the Authorities to CIVJIG 80.43:

In *Moeller v. Hauser*, 237 Minn. 368, 378, 54 N.W.2d 639, 645 (1952), the supreme court noted that "[i]t is well established in this state that a hospital, private or charitable, is liable to a patient for the torts of its employees under the doctrine of Respondeat superior."

In *Popovich v. Allina Health System*, 946 N.W.2d 885 (Minn. 2020), the supreme court held that a hospital is subject to liability under an "apparent authority" theory for the negligent acts of emergency room physicians who are working as independent contractors at the hospital. The court held that the hospital could be subject to liability if two requirements are met:

> (1) the hospital held itself out as a provider of emergency medical care; and (2) the patient looked to the hospital, rather than a specific doctor, for care and relied on the hospital to select the personnel to provide services.

Id. at 898.

CIVJIG 80.44

VICARIOUS LIABILITY—APPARENT AUTHORITY—EMERGENCY CARE *[New]*

The negligence of a physician (in the employ of a hospital) (who is an independent contractor) is the negligence of a hospital if:

1. The hospital held itself out as a provider of emergency care, and

2. The plaintiff looked to the hospital, rather than a specific physician, for care, and

3. The plaintiff relied on the hospital to select the personnel to provide the emergency services.

USE NOTE

This instruction should be given only in cases in which there is an issue as to whether a hospital is responsible for the professional negligence of a physician who is an independent contractor providing emergency services for a hospital. The first bracketed language should be used if there is no dispute as to the physician's status as an independent contractor. The second bracketed language should be used if there is a dispute as to whether the physician is an independent contractor. If there is a dispute over the physician's status, the jury should be instructed according to CIVJIG 30.10 (Definition – Independent Contractor – Employee).

AUTHORITIES

In *Popovich v. Allina Health System*, 946 N.W.2d 885 (Minn. 2020), the supreme court held that a hospital is subject to liability under an "apparent authority" theory for the negligent acts of physicians who are working as independent contractors at the hospital, and that a hospital may be held liable for the professional negligence of emergency room physicians working as independent contractors. The court held that the hospital could be subject to liability if two requirements are met:

> (1) the hospital held itself out as a provider of emergency medical care; and (2) the patient looked to the hospital, rather than a specific doctor, for care and relied on the hospital to select the personnel to provide services.

Id. at 898.

ATTORNEYS

CIVJIG 80.55

DUTY OF AN ATTORNEY

USE NOTE

Add the following Use Note before Authorities:

The jury instructions refer to the plaintiff's negligence, but there are no special verdict questions covering the plaintiff's negligence and causation. It would be preferable to include specific special verdict questions on those issues.

In cases involving legal malpractice claims in which the defense of contributory negligence is asserted, the standards for negligence and causation in legal malpractice claims could be introduced separately in order to avoid potential confusion. As an example:

(Plaintiff) has alleged that (Defendant) was negligent. You will be asked to determine whether (Defendant) was negligent and if so, whether that negligence was a cause of (Plaintiff's) damages.

[Give CIVJIG 80.55].

An attorney's negligence is a cause of the plaintiff's damages if, but for the defendant's negligence, (Plaintiff) would have [e.g., have been granted the bank charter/have obtained a more favorable result in the transaction than the result obtained]?

(Defendant) has alleged that (Plaintiff) was negligent and that (Plaintiff's) negligence was a direct cause of (his) (her) injury.

[Give CIVJIG 25.10]

(Plaintiff)'s negligence is a cause of the (Plaintiff)'s own damages if it was a direct cause of those damages.

[Give CIVJIG 27.10]

The causation standard in the legal malpractice instruction is taken from CIVSVF 80.97 and CIVSVF 80.98.

CIVJIG 80.61

ATTORNEY-CLIENT RELATIONSHIP—CONTRACT

AUTHORITIES

Add to Authorities:

Soderberg & Vail, LLC v. Meshbesher & Spence, LTD., No. 27-CV-12-23143, 2016 WL 22251 (Minn. Ct. App. Jan 4, 2016), arose out of a claim by Soderberg & Vail, LLC (S & V) against Meshbesher & Spence, LTD (M & S), for a portion of the attorney fees that the Meshbesher law firm received in a personal injury lawsuit referred to it by the Soderberg law firm. The plaintiff law firm advanced several theories of recovery, including breach of contract, promissory estoppel, unjust enrichment, breach of fiduciary duty, conversion, and civil theft.

The court of appeals affirmed the district court's dismissal of the breach of contract claim because the fee splitting arrangement in the case was unenforceable. The court first noted Rule 1.5(e) of the Minnesota Rules of Professional Conduct, which states:

> A division of a fee between lawyers who are not in the same firm may be made only if
>
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
>
> (3) the total fee is reasonable.

The court applied the supreme court's decision in *Christensen v. Eggen*, 577 N.W.2d 221, 223 (Minn.1998), which held in a case where the client was not told of the share that each attorney would receive and did not consent to the fee split and joint representation in writing that the arrangement violated public policy because it did not comply with Rule 1.5(e) and was therefore unenforceable:

> Here, the M & S and S & V law firms had been operating under a cross-referral arrangement for many years. Whether Will was aware that some fee would be paid to S & V is disputed, but it is undisputed that he was not informed of the terms of how fees would be shared and did not confirm or consent in writing to the fee

splitting. Even if we accept S & V's account of conversations with Will, we conclude that *Christensen* controls. Minn. R. Prof. Conduct 1.5(e) limits referral fee-splitting arrangements to carefully defined circumstances.

Id. at *3.

CIVJIG 80.66

LEGAL MALPRACTICE—CAUSATION

USE NOTE

Replace the existing Use Note with the following:

The basic instruction on direct cause, CIVJIG 27.10, can be used in a legal malpractice action. The Committee recommends crafting an appropriate special verdict form question with respect to the issue of cause-in-fact or actual cause. CIVSVF 80.97 can be used in actions involving an alleged destruction of a cause of action (case-in-a-case) and CIVSVF 80.98 (transactional malpractice) can be modified for use in actions involving alleged malpractice in transactional or non-litigation settings. If those special verdict forms are used there should be a parallel jury instruction covering but-for causation. Based on CIVSVF 80.98, for example, the instruction in a case involving transactional negligence would be: "An attorney's negligence is a cause of the plaintiff's damages if, but for the defendant's negligence, plaintiff would [e.g., have been granted the bank charter/have obtained a more favorable result in the transaction than the result obtained]?"

AUTHORITIES

Add to Authorities:

In *Guzick v. Kimball*, 869 N.W.2d 42 (Minn. 2015), the supreme court considered the application of the certification of expert review statute, Minn. Stat. § 544.42. In the course of analyzing disclosure requirements under the statute the court considered the issue of whether expert testimony is required for the elements of a legal malpractice claim, something the court noted that it has discussed "on only a few occasions." *Id.* at 49. The court has taken the position that the duty and breach of duty issues must be established by expert testimony. *See Hill v. Okay Construction Co.*, 312 Minn. 324, 335–36, 252 N.W.2d 107, 116 (1977). In *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 116 (Minn.1992), the court reiterated *Hill*'s holding that expert testimony is required on the duty and breach cases "unless the conduct can be evaluated by a jury in the absence of expert testimony."

The court noted that it has "never required expert testimony on the other elements of a prima facie case of legal malpractice," however. *Id.* The court's discussion of whether expert testimony is required was equivocal:

[*Brown-Wilbert, Inc. v. Copeland Buhl & Co., 732 N.W.2d 209, 219*

(Minn.2007)], an accounting malpractice case, credited [*Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 266 (Minn.1992)], a legal malpractice case, as "stating that expert testimony is generally required to establish the standard of care applicable to legal malpractice, whether the attorney deviated from that standard, and *whether that deviation caused the plaintiff's injury*." *Brown-Wilbert,* 732 N.W.2d at 218 (emphasis added). But in *Admiral Merchants* we only stated that "[e]xpert testimony generally is required to establish a standard of care applicable to an attorney whose conduct is alleged to have been negligent, and further to establish whether the conduct deviated from that standard." 494 N.W.2d at 266 (citing *Hill,* 312 Minn. at 337, 252 N.W.2d at 116). In fact, in that case the plaintiff, Admiral Merchants, presented expert testimony "that the alleged failure to request arbitration was negligent," not that the negligent act caused the injury. *Id.* Even in the absence of expert testimony on causation, we concluded a genuine issue of material fact existed and reversed the district court's grant of summary judgment in favor of the law firm. *Id.* at 267.

Guzick, 869 N.W.2d at 49. While there are statements to the contrary, the court has not taken the position that expert testimony is a requirement to establish causation.

In *Guzick*, however, the parties agreed that an expert was required to establish the acts that constituted negligence and proximate cause, but they disagreed as to whether an expert was necessary on the but-for causation requirement. *Id.* at 49–50. Justice Lillehaug, concurring, noted that had Guzick disputed that issue, it would have been a close case:

> [I]t is not entirely clear whether proximate cause in this case is even a question of fact for the jury, or rather a question of law for the court. *Compare Wartnick*, 490 N.W.2d at 115 ("The determination of proximate cause is normally a question of fact for the jury . . . . However, if reasonable minds cannot disagree, proximate cause becomes a question of law."), and Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. q. (Am. Law Inst.2010) ("Scope of liability is a mixed question of fact and law, much like negligence. As with negligence, the court's role is to instruct the jury on the standard for scope of liability when reasonable minds can differ as to whether the type of harm suffered by the plaintiff is among the harms whose risks made the defendant's conduct tortious, and it is the function of the jury to determine whether the harm is within the defendant's scope of liability."), with William L. Prosser, The Minnesota Court on Proximate Cause, 21 Minn. L. Rev. 19, 27 (1937) (arguing, regarding unforeseeable consequences and proximate cause, that the "question is not one of

causation, for the causal connection is clear and direct, without intervening forces of any kind. It is rather one of policy, as to whether defendant's responsibility for its admitted fault is to be extended to such results.").

Guzick, 869 N.W.2d at 52, n.1 (Lillehaug concurrence).

The court also noted that it has "never addressed the need for expert testimony on but-for causation in a legal malpractice claim." *Id.* at 50. Rather than relying on a general rule, the court stated that it determines "whether the facts needed to establish but-for causation are within an area of common knowledge and lay comprehension such that they can be adequately evaluated by a jury in the absence of an expert." *Id.*

SPECIAL VERDICT FORMS

CIVSVF 80.93

LOSS OF A CHANCE OF A MORE FAVORABLE OUTCOME

3. *If your answer to Question 2 was "Yes," then answer the following questions:*

a. State the percentage of (plaintiff)'s chance of a (more favorable outcome) before (defendant's) negligence.

_____%

b. State the percentage of (plaintiff)'s chance of a (more favorable outcome) after (defendant's) negligent care and treatment.

_____%

CIVSVF 80.96

WRONGFUL DEATH—LOSS OF A CHANCE AS AN ALTERNATIVE THEORY

Replace Question 4 with the following:

4. *If your answer to Question 3 was "Yes," then answer the following question*: By what percentage was (name of plaintiff)'s chance of a more favorable outcome reduced by (name of defendant)'s negligence?

   a. State the percentage of (name of decedent)'s chance of a more favorable outcome before (defendant's) negligence.

   b. State the percentage of (name of decedent)'s chance of a more favorable outcome after (defendant's) negligent care and treatment.

CIVSVF 80.99

MEDICAL MALPRACTICE—HOSPITAL LIABILITY FOR ACTS OF INDEPENDENT CONTRACTORS

[New]

1. Did (hospital) hold itself out as a provider of emergency care?

Yes _____ No _____

2. *If your answer to Question # 1 was "Yes," then answer this question*: Did (plaintiff) look to the hospital, rather than a specific physician, for care?

Yes _____ No _____

3. *If your answer to Question # 2 was "Yes," then answer this question*: Did (plaintiff) rely on the hospital to select the personnel to provide the emergency services?

Yes _____ No _____

4. *No matter how you answered Questions 1, 2, or 3, answer this question*: Was (defendant health care professional) negligent in (his) (her) care and treatment of (plaintiff)?

Yes _____ No _____

5. *If your answer to Question 4 was "Yes," then answer this question*: Was (defendant heath care professional)'s negligence in providing that care and treatment a direct cause of harm or injury to (plaintiff)?

Yes _____ No _____

[List damages question(s) appropriate to the case involved.]

USE NOTE

This special verdict form is intended for use in cases in which there

is an issue as to whether a hospital held itself out as providing emergency care when the alleged medical malpractice was committed by a health care professional working at the hospital as an independent contractor. The verdict form asks the jury to answer the professional liability question irrespective of how it answered the questions relating to vicarious liability. Even if the jury answers result in a finding of no vicarious liability on the part of the hospital, the jury should still answer the liability and causation questions relating to the negligence of the independent contractor.

The questions in this special verdict form correspond with the following jury instructions:

1. CIVJIG 80.44: Vicarious Liability – Apparent Authority – Emergency Care

2. CIVJIG 80.44: Vicarious Liability – Apparent Authority – Emergency Care

3. CIVJIG 80.44: Vicarious Liability – Apparent Authority – Emergency Care

4. CIVJIG 80.10: Duty of Doctor, Dentist.

5. CIVJIG 27.10: Direct Cause.

AUTHORITIES

In *Popovich v. Allina Health System*, 946 N.W.2d 885 (Minn. 2020), the supreme court held that a hospital is subject to liability under an "apparent authority" theory for the negligent acts of physicians who are working as independent contractors at the hospital, and that a hospital may be held liable for the professional negligence of emergency room physicians working as independent contractors. The court held that the hospital could be subject to liability if two requirements are met:

> (1) the hospital held itself out as a provider of emergency medical care; and (2) the patient looked to the hospital, rather than a specific doctor, for care and relied on the hospital to select the personnel to provide services.

Id. at 898.

CATEGORY 85

PROPERTY

INTRODUCTORY NOTE

Add the following paragraph at the end of the Introductory Note:

Minnesota law provides that a tenant may bring an action for unlawful removal from a leased property. *See* Minn. Stat. § 504B.375 and Minn. Stat. § 504B.231. Section 504B.231 provides treble damages for a tenant who "unlawfully and in bad faith" is removed from residential premises. In *Reimringer v. Anderson*, 960 N.W.2d 684(Minn. 2021), the supreme court held that to prove bad faith under the statute, a tenant must "show that the landlord acted in a dubious or dishonest fashion—in a way that suggests the landlord was acting with some ulterior motive or purpose beyond just a desire to oust the tenant—when unlawfully removing them from a residential premises." *Id.* at 690.

TRESPASSERS AND ENTRANTS

CIVJIG 85.19

INJURY TO TRESPASSING CHILDREN—"ATTRACTIVE NUISANCE"

Replace item 5 with the following:

5. The benefits to the possessor of keeping the structure or artificial condition as it is and the burden of eliminating it are slight compared with the risk to the children, and

CIVJIG 85.25

DUTY OF POSSESSOR AND ENTRANT

AUTHORITIES

Add the following to the end of the Authorities:

Senogles v. Carlson, 902 N.W.2d 38 (Minn. 2017), arose out of a near drowning of a four-year-old boy at an outdoor birthday party for relatives held at the house of his great uncle, Carlson. Senogles had dropped her children off with her mother, who took them to the party. Carlson's property abutted the Mississippi River. Children at the party had been swimming there under adult supervision. They came back from swimming, but lost track of the four-year-old, finding him a few minutes later in the river. He suffered severe brain damage.

The district court dismissed the suit against Carlson on the grounds that the child's injury was not foreseeable to Carlson. The court of appeals affirmed because it concluded that the danger was obvious as a matter of law. *Senogles v. Carlson, No. A15–2039*, 2016 WL 3659314, at *3 (Minn. Ct. App. July 11, 2016).

The supreme court reversed, rejecting the defendant's argument that the danger was obvious and declining "to adopt a categorical rule that the danger of swimming unattended in any Minnesota river, lake, or pool is necessarily obvious to all children, no matter how young and inexperienced." *Senogles*, 902 N.W.2d at 47. The court held there was a remaining issue whether Carlson should have anticipated injury to the child, notwithstanding the obviousness of the danger. The court characterized the issue of whether "there was an objectively reasonable expectation of danger that Carlson should have anticipated" the injury as "at least, a close call." *Senogles*, 902 N.W.2d at 48.

Carlson asked the court to adopt a new rule of law holding "that a Minnesota landowner owes no duty of care to a child entrant if the child enters the land accompanied by a parent or guardian, no matter how foreseeable the harm." *Senogles*, 902 N.W.2d at 48. The court declined, in part because there is no Minnesota precedent that supports such a rule and in part because "it would undermine not only our foreseeability jurisprudence, but also our system of comparative fault." *Senogles*, 902 N.W.2d at 48. The court emphasized that it "has rejected or significantly limited other such absolute tort doctrines that increase 'the likelihood of unfairness' and has opted for 'a comparative fault framework that "contemplates justice for all parties."' " *Id.* at 44, quoting *Toetschinger v. Ihnot*, 250 N.W.2d at 204, 211 (Minn. 1977).

In *Spinler v. City of Brownsdale*, No. A19-178, 2020 WL 3172847

(Minn. Ct. App. June 15, 2020), the plaintiff sustained injuries when she slipped and fell on the sidewalk outside the post office. The district court granted summary judgment for the city because the plaintiff could not as a matter of law establish proximate cause because a debilitating physical condition rendered her unable to testify as to the cause of the accident. The court found an affidavit by Ms. Spinler to be sufficient on the causation issue, but nonetheless affirmed the grant for summary judgment based on its conclusion that the danger was open and obvious, even though the issue was not decided in the district court.

The court initially noted that "[t]here is no common-law duty to warn a person of open and obvious risks." *Id.* The court cited *Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995), in which the supreme court stated that "no one needs notice of what he knows or reasonably may be expected to know." The court stated that the standard is objective. The issue is not whether the injured person actually saw the dangerous condition, " 'but whether it was in fact visible.' " *Id.*, citing *Louis v. Louis*, 636 N.W.2d 314, 321 (Minn. 2001). The condition and risk must be apparent to a reasonable person using "ordinary perception, intelligence, and judgment." *Id.*

The court noted that the issue is usually but not always a question of fact, *Id.*, but in applying these standards and viewing the facts (photographs of the sidewalk defect taken by Mr. Spinler and Ms. Spinler's affidavit) in the light most favorable to the plaintiff, the court concluded that the sidewalk defect was obvious as a matter of law:

> Even a cursory downward glance would have revealed the hole in the sidewalk. Nothing precluded Ms. Spinler from seeing the open and obvious defect in the sidewalk. Because the defect was clearly visible to Mr. Spinler when he visited the scene after Ms. Spinler sustained her injuries, because it is clearly evident in photographs taken shortly after the incident, and because any out-of-season vegetative growth did not conceal the defect, the city owed no duty to persons using the sidewalk to warn of this open-and-obvious sidewalk defect.

Id. at *4.

The court did not note Restatement (Second) of Torts § 343A (1) (Am. Law Inst. 1965), in its analysis. That section states that "A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.*" (Emphasis added).

In contrast, in *Homick v. Helland*, No. A17–1245, 2018 WL 414381 (Minn. Ct. App. Jan. 16, 2018), the court of appeals applied § 343A in

holding that the issue of whether a raised slab on a sidewalk leading from the rear entrance of an apartment building was an open and obvious danger. The court concluded that there was a genuine issue of material fact as to whether the owner of the building should have anticipated injury to the plaintiff. Following the supreme court's opinion in *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017), the court of appeals held that it was a "close case" as to whether the owner should have foreseen injury to the plaintiff. 2018 WL 414381, at *3.

The court of appeals also applied section 343A in *Frimpong v. Taylor Ridge 26 LLC*, No. A19-1508, 2020 WL 1987037 (Minn. Ct. App. Apr. 27, 2020). The plaintiff in that case was injured when he slipped and fell on a sidewalk with some icy patches at Taylor Ridge Condominiums while he was taking out the trash. The court held that the plaintiff failed to produce any "specific, probative evidence genuinely disputing the objective visibility of the ice," upholding the district court's conclusion "that the icy sidewalk presented an open and obvious danger to an objectively reasonable person." *Id.* at *3.

The court also held that Frimpong failed to present any evidence showing that the defendant should have anticipated the harm, notwithstanding its obviousness. The court applied the supreme court's decision in *Peterson v. W. T. Rawleigh Co.*, 144 N.W.2d 555, 558 (Minn. 1966), which stated that a possessor should anticipate harm if the advantages to be gained to a reasonable person in the plaintiff's position would outweigh the apparent risk. In *Peterson*, the plaintiff-employee was crossing an obviously icy parking lot to get to a loading dock where the employee worked. The supreme court in *Peterson* contrasted its facts with the hypothetical case of a shopper injured while reaching for an item, where the store might not anticipate harm to the shopper because the shopper was not under the same compulsion as the employee in *Peterson*.

Having framed the issue of whether the defendant should have anticipated Frimpong's trip to take out the trash in cost-benefit terms, the court concluded that "Frimpong provided no reason why respondents should have expected him to negotiate the open and obvious danger. He provided no facts showing why his 'livelihood was involved' or why he was under 'such compulsion' to navigate the icy sidewalk to take out his trash." 2020 WL 1987037 at *3.

Finally, the court concluded the defendant did not have constructive knowledge of the danger presented by the sidewalk, given the time of his early morning injury. *Id.* at *4.

CIVJIG 85.31

RECREATIONAL USE

AUTHORITIES

Add the following to the end of the Authorities:

In *Ouradnik v. Ouradnik, (No. A16-1516*, 2018 WL 2709178 (Minn. June 6, 2018)), the Minnesota Supreme Court held that the Recreational Use Statute, Minn. Stat. §§ 604A.20 to.27, applies only in cases where a landowner's property is offered to "the public," pursuant to Minn. Stat. § 604.A.21.

The case arose out of injuries sustained by Corey Ouradnik, an adult, who was hunting on his father's farm while he was climbing to a deer stand when one of the board steps leading to the stand gave way. Robert Ouradnik, the owner of the farm, permitted his sons to hunt there if they notified him. The land was not posted and was not otherwise open to the public. He took affirmative steps to ensure that the property would be used only by members of his immediate family.

The court followed its decision in *Hughes v. Quarve & Anderson Co.*, 338 N.W.2d 422 (Minn. 1983), in concluding that that limitations on landowner liability in Minn. Stat. § 604.A.22 apply only if the property use is offered to the public. The court construed "the public" to mean more than just the landowner and the landowner's immediate family.

The impact of a finding that the Recreational Use Statute does not apply means that the usual rules governing the liability of possessors of and entrants on land will apply. *See* CIVJIG 85.25 (Duty of Possessor and Entrant).

Minn. Stat. § 3.736, subd. 3(i) (2020) provides that "the state and its employees are not liable" for "a loss incurred by a user arising from the construction, operation, or maintenance of the outdoor recreation system . . . except that the state is liable for conduct that would entitle a trespasser to damages against a private person."

The supreme court applies the adult trespasser standard to both adults and children who are under an adult's supervision in cases involving the statute. *See, e.g.*, *Sirek by Beaumaster v. State, Dep't of Nat. Res.*, 496 N.W.2d 807, 811 (Minn. 1993); *Kerkula v. City of Moorhead, No. A20-0657*, 2021 WL 669024, at *4 (Minn. Ct. App. Feb. 22, 2021).

The supreme court has applied the Restatement (Second) of Torts

§ 335 (Am. Law Inst. 1965), to determine liability to trespassers. *See Sirek*, 496 N.W.2d at 811. Section 335 reads as follows:

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if
>
> (a) the condition
>
> (i) is one which the possessor has created or maintains and
>
> (ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and
>
> (iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and
>
> (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

Kerkula v. City of Moorhead, No. A20-0657, 2021 WL 669024 (Minn. Ct. App. Feb. 22, 2021), involved a wrongful death case arising out of the drowning of a nine-year-old in a pond that the Department of Natural Resources maintained while she was at a summer camp operated by a municipality. The adult trespasser standard of care applied to the child, but the court held that the allegations in the plaintiff's complaint established that the dangers were hidden and known by the DNR:

> Kerkula alleged that the DNR created and maintained the pond in a dangerous condition based on its "lack of clarity" and its "varying depths . . . including a sudden drop-off in depth." She alleged that those dangers were hidden and not obvious and that the DNR knew the pond "had concealed dangers including . . . lack of clarity of the water and sudden changes in depth of the water, and that those dangers were likely to cause serious injury or death." And she alleged that the DNR "failed to exercise reasonable care to warn Grace of the condition and risks involved."

Id. at *4. Kerkula's allegations were found sufficient to state a case under the trespasser-liability exception. *Id.*

LANDLORD AND TENANT

CIVJIG 85.40

LEASED PREMISES—LATENT DEFECT—DUTY OF LANDLORD

Replace the first paragraph of the instruction with the following:

The landlord has a duty to warn the tenant about (an) unsafe condition(s) on the property if:

CIVJIG 85.46

LEASED PREMISES—NEGLIGENT BREACH OF COVENANT TO REPAIR

AUTHORITIES

Add the following to the end of the Authorities:

The plaintiffs in *Rush v. Westwood Village Partnership*, 887 N.W.2d 701 (Minn. Ct. App. 2016) brought an action against the St. Cloud Housing and Redevelopment Authority (HRA), the owner and property manager of the apartment complexes in which the plaintiffs lived, for damages in connection with a bedbug infestation. The court of appeals held that the covenant of habitability, Minn. Stat. § 504B.161, limited the HRA's responsibility to the condition of the leased premises itself and did not include the condition of tenants' personal belongings, furniture, or other personal effects. *Rush*, 887 N.W.2d at 707.

CIVJIG 85.50

LEASED PREMISES-UNIFORM BUILDING CODE VIOLATION

Replace the existing instruction with the following:

Uniform Building Code

A landlord is negligent if a condition on the property violates the Uniform Building Code. A condition on the property violates the Uniform Building Code if:

1. The landlord violated (note appropriate section of the Uniform Building Code), and

2. The landlord knew or should have known of the violation, and

3. The landlord failed to take reasonable steps to fix the violation, and

4. The violation was a direct cause of the accident.

CIVJIG 85.55

ABNORMALLY DANGEROUS ACTIVITIES

AUTHORITIES

Add to end of Authorities:

In *Roberson v. STI International*, No. A20-2020, 2020 WL 5107336 (Minn. Ct. App. Aug. 31, 2020), the plaintiff was injured while firing a pistol manufactured by STI. Among other theories, the plaintiff alleged that STI should be strictly liable for engaging in an abnormally dangerous activity when manufacturing the pistol. The court of appeals affirmed the district court's grant of summary judgment on the issue.

The court noted that while the supreme court referenced the list of factors set out in the Restatement (Second) of Torts § 520 (Am. Law Inst. 1977), in *Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 860–61 & n.2 (Minn. 1984), no supreme court case ever actually applied those factors.

Acknowledging but not specifically applying section 520, the court of appeals concluded that the evidence was insufficient to permit an assessment of the strict liability theory. 2020 WL 5107336, at *4.

The American Law Institute's current position on strict liability for abnormally dangerous activities is set out in Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 20 (Am. Law Inst. 2010):

> (a) An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
>
> (b) An activity is abnormally dangerous if:
>
> (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
>
> (2) the activity is not one of common usage.

SIDEWALKS AND STREETS

CIVJIG 85.63

SIDEWALKS AND STREETS—DUTY OF MUNICIPALITY

AUTHORITIES

Add the following to the end of the Authorities:

The plaintiff in *Hoff v. Surman*, 883 N.W.2d 631 (Minn. Ct. App. 2016), was rear-ended by a Metro Transit bus. Hoff sued the driver and the driver's, the Metropolitan Council, and defendants claimed 'snow and ice' immunity under Minn. Stat. § 466.03. The court of appeals held the statute "does not extend to bar claims based solely on allegations of negligent driving," and set out three bases for its holding. First, no statutory language extends immunity to claims based on negligent driving. Second, the statutory exceptions to immunity do not make sense if immunity under the statute bars all negligent driving claims. Third, no Minnesota case has applied snow and ice immunity to claims based on the negligent driving of a municipal agent. *Hoff*, 883 N.W.2d at 634–635.

DUTIES OF OTHER PROPERTY OWNERS

CIVJIG 85.70

INNKEEPER'S DUTY

Replace the existing CIVJIG 85.70 and Use Note with the following:

Standard of conduct

(Defendant-proprietor) is required to use reasonable care in operating (his)(her) business.

Definition of "reasonable care"

"Reasonable care" is the care that a reasonable person would use in similar circumstances. The failure to use reasonable care is negligence.

Definition of "negligence"

"Negligence" is doing something that a reasonable person would not do, or failing to do something a reasonable person would do, in similar circumstances.

Deciding negligence

(Proprietor) was negligent if:

1. (Proprietor) was put on notice of the offending person's vicious or dangerous potential by some act or threat, and

2. (Proprietor) had an adequate opportunity to protect the injured person, and

3. (Proprietor) failed to take reasonable steps to protect the injured person.

USE NOTE

This instruction is intended for use in cases involving innkeeper's

liability. The issue in these cases often arises in cases involving claims against bars for failing to prevent the criminal misconduct of a third person, but the theory covered here is separate from any theory that might be asserted by a claimant under the Civil Damage Act, and it is not limited to cases involving bars.

In determining whether there is sufficient evidence to warrant submitting an innkeeper's liability case to a jury, the Minnesota Supreme Court's stated in *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 192 (Minn. 2019), that "when the totality of the facts and circumstances put the innkeeper on notice" there is "a duty based on foreseeability." Attorneys should consider *Henson* carefully in determining how a jury should be charged.

AUTHORITIES

Add the following to the end of Authorities:

In *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185 (Minn. 2019), an off-duty bar employee slipped and hit his head on the sidewalk while aiding the bar manager in escorting an intoxicated and disruptive patron from the bar. The plaintiff asserted innkeeper's liability and Civil Damages Act claims against the bar.

The innkeeper's liability claim requires proof that the injury was foreseeability. The evidence was clear that the disruptive patrons had been in altercations with other patrons and bar employees before the encounter that led to Henson's death. The supreme court concluded that the "evidence is enough to create a disputed issue of material fact or disputed reasonable inferences from undisputed facts." *Id.* at 192.

The court noted cases in which it has held that certain injuries were not foreseeable, but that:

> Unlike these cases of unanticipated incidents, *when the totality of the facts and circumstances put the innkeeper on notice, we have held that there was a duty based on foreseeability.* In Klingbeil v. Truesdell, 256 Minn. 360, 98 N.W.2d 134 (1959), we held that "there is ample evidence in the record from which the jury could find that [the patrons] were intoxicated to the point where the proprietor or his servant should have been aware of the fact that their conduct would lead to trouble." Id. at 138; see also Mettling v. Mulligan, 303 Minn. 8, 225 N.W.2d 825, 828 & n.3 (1975) (noting that we have "found liability in tavern owners predicated upon intoxication of the offending patron" and listing cases).

922 N.W.2d at 192.

In *Friesen v. VFW Post 2793*, No. A19-1198, 2020 WL 610595 (Minn.

Ct. App. Feb. 10, 2020), Bradley Friesen had been "argumentative and boisterous" at the VFW. He died from injuries he sustained when he fell after he was pushed by Brandt, another patron, who was accompanying the bar's doorman in escorting Friesen out of the VFW. The district court granted summary judgment in favor of the VFW and the court of appeals affirmed because of the lack of evidence showing that Brandt had engaged in any conduct that would have put the VFW on notice that he had a dangerous propensity to cause injury.

Relying on *Henson,* the plaintiff relied on the "totality of the circumstances" in arguing that the VFW had notice that an injury could occur. The court of appeals rejected the argument in concluding that the key is not whether there was a risk of injury, given the totality of the circumstances, but whether the VFW had " 'notice of the offending party's vicious or dangerous propensities by some act or threat.' " *Id.* at *2, quoting *Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997). The court affirmed the district court's grant of summary judgment because of the lack of any indication that the VFW had notice of Brandt's vicious propensity.

The plaintiff also argued that the VFW had notice that Friesen might be injured by Brandt because of Friesen's own conduct. The court of appeals also rejected that argument for three reasons. First:

> By making this argument, appellant generalizes "foreseeability" to include the foreseeability that any patron might be injured by another patron, not that Brandt might injure Friesen. But *Henson* does not support this generalized view of foreseeability. In *Henson*, the "notice" that leads to a duty based on foreseeability is the "notice of the offending party's vicious or dangerous propensities by some act or threat." 922 N.W.2d at 190 . . . And in *Henson*, the analysis of the totality of the facts and circumstances that might put the innkeeper on notice and result in a duty based on foreseeability focused on the offending party's conduct. *See id.* at 192–93 (offending party was in altercations with other patrons, drinking, and threw a punch before the injury to the victim).

Id. at *2.

Second, the court also rejected the argument because it is inconsistent with the elements of innkeeper's liability, which includes proof that the innkeeper is on notice of "the offending party's" vicious or dangerous propensities. Finally, the court found that imposing innkeeper's liability on the basis of the vicious or dangerous propensities of any patron would effectively create strict liability, a proposition rejected by the supreme court in *Devine v. McLain*, 306 N.W.2d 827, 831 (Minn. 1981). *Friesen*, 2020 WL 610595 at *3.

PART IV

DAMAGES

Table of Categories

Category 90 Damages
Category 92 Property Damage

CATEGORY 90

DAMAGES

INTRODUCTORY NOTE

Add following the last full paragraph on p. 394 in the main volume:

In *Auers v. Progressive Direct Ins. Co.*, 878 N.W.2d 350 (Minn. Ct. App. 2016), the plaintiff's health-insurance carrier negotiated a discount from the plaintiff's medical providers and obtained a subrogation lien through payment of the negotiated amount. The court held the subrogation lien was limited to the amount the carrier paid, and the exception in Minn. Stat. § 548.251, subd. 2(1) for amounts of collateral sources for which subrogation has been asserted applied only to the amounts actually paid by the carrier. "The negotiated discounts remain collateral sources to be deducted from the injured party's verdict or settlement under Minn. Stat. § 548.251." *Id.* at 357.

PART IV

DIALOGUE

CATEGORY 92

PROPERTY DAMAGE

CIVJIG 92.10

DAMAGE TO PROPERTY—ELEMENTS

AUTHORITIES

Add to Authorities Damage to Property:

In *Nichols v. Cimbura*, No. A15-0861, 2016 WL 456952 (Minn. Ct. App. Feb. 8, 2016), Nichols was involved in a car accident with Cimbura. Cimbura admitted fault. Cimbura's insurer paid $11,456 to Nichols for the repairs that were made to his car.

After the accident Nichols hired an appraisal expert "to conduct a diminished-value appraisal on his car." The expert reported that the repair work on the car was of excellent quality and that there was no repair-related diminution in value. Based on the pre-accident value of the car, however, the expert's opinion was that Nichols's car suffered a diminution in value of $4,938.97, solely because it was involved in an accident. There was no explanation in the report as to how the expert determined the pre-accident value of the car. The report emphasized "the general perception of the public that a collision history is a 'defect' that diminishes the value and quality of a vehicle." Both parties moved for summary judgment. The district court denied Nichols's motion and granted Cimbura's. The court of appeals affirmed.

Minnesota adopted the rule from the Restatement of Torts § 928 (1939) in *O'Connor v. Schwartz*, 304 Minn. 155, 158, 229 N.W.2d 511, 513 (1975). That rule gives the plaintiff the option of recovering for the difference in value before and after the harm or the reasonable cost of repair and restoration, with due allowance for the difference in value before and after the repairs. That rule was continued in the Restatement (Second) of Torts § 928 (1979), which reads as follows:

> When one is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for

(a) the difference between the value of the chattel before the harm and the value after the harm or, at his election in an appropriate case, the reasonable cost of repair or restoration, *with due allowance for any difference between the original value and the value after repairs,* and

(b) the loss of use.

The court of appeals concluded that *O'Connor* and the Restatement supported Nichols's argument that he should be permitted to recover for the diminution in fair market value due to the car's accident history, a result permitted in other jurisdictions applying section 928 of the Restatement (Second) of Torts. *Nichols*, 2016 WL 456952, at *4 n. 1. The court concluded that the evidence was insufficient to establish the "due allowance" for any diminution in the value of the car:

> His expert failed to examine the car before the accident, and Nichols presented no evidence to substantiate the conclusion that the car was in "excellent" condition before the accident. Nichols further failed to provide an appraisal of the car's post-accident, pre-repair value or a detailed appraisal of the car after repairs were completed. Without these figures, the district court could not, as a matter of law, determine that Nichols's chosen measure of damages—the cost of repairs—would not exceed the alternative measure of damages, diminution in value. Because genuine issues of material fact remained, Nichols was not entitled to judgment as a matter of law. The district court properly denied his motion for summary judgment.

2016 WL 456952, at *4 n. 1. The court of appeals also concluded that the district court properly granted Cimbura's motion for summary judgment.

Appendix

Mortality Tables

The National Center for Health Statistics publishes life expectancy tables. United States Life Tables can be found at: www.cdc.gov/nchs/products/life_tables.htm.

Table of Laws and Rules

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